RENHOME BRICKS FACTORY SDN BHD & ANOR A

v.

WATAH UMPIN

HIGH COURT SABAH & SARAWAK, KUCHING B
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 12-29-2008-II]
31 DECEMBER 2008

DAMAGES: *Appeal - Appeal against award made - Principle applicable - Whether appealing against every head of award without highlighting errors of law could render appeal frivolous, vexatious and an abuse of the court's process - Whether both plaintiff and defendant ought to assist court in assessing quantum - Whether sufficient and proper for defendant to merely put plaintiff to strict proof and deny liability and quantum* C D

DAMAGES: *Special damages - Nursing care - Whether trial judge prohibited from awarding fair and reasonable sum for nursing care in the absence of evidence* E

DAMAGES: *Special damages - Transportation costs - Whether trial judge prohibited from awarding fair and reasonable sum for transportation costs in the absence of evidence*

TORT: *Negligence - Test for - Whether issue of negligence a question of fact or of law - Manner of determining negligence* F

Whilst working at the 1st appellant's factory, the respondent was hit from behind by a forklift driven by the 2nd appellant - an employee and/or agent of the 1st appellant. The accident was G caused by the negligence of the 2nd appellant who was driving the forklift laden with pallets of bricks, which apparently obscured his view. The respondent sustained serious injuries and in consequence suffered both general and special damages. She brought an action in negligence against the 1st appellant as the H vicariously liable master and/or employer of the 2nd appellant - the negligent forklift driver. In the sessions' court, the judge found the appellants wholly (100%) liable for the accident and awarded the respondent general damages of RM40,500 and special damages of RM110,566.20 with interest. The appellants appealed against both I liability and quantum and in their memorandum of appeal disputed almost every single head of the award.

Held (dismissing the appeal with costs):

(1) The appellants in appealing against both quantum and liability had challenged every head of the award without highlighting the errors of law. Such failure could possibly show that the appeal was frivolous, vexatious and an abuse of the process of court. This was more so when it is trite that the appellate court will not ordinarily interfere in the finding of facts of the trial judge and/or in respect of quantum merely because it appears to be excessive, unless the following are shown: (i) that the award or findings were clearly wrong or erroneous, (ii) the award or findings took into account irrelevant matters and failed to consider relevant matters, and (iii) the findings were clearly wrong in law and principle. (para 6)

(2) There was no merit in the appellants' argument against the sessions' court's finding of 100% liability against them. The judge had correctly evaluated the evidence in finding that the respondent was hit by the forklift from behind when she was standing and working in her usual place of work. The issue of negligence is a question of fact and not of law. To determine the issue of negligence, the court must evaluate the following evidence, namely: (i) who caused the accident; (ii) was there a duty of care; (iii) was there any breach of that duty to take care; and (iv) were there any consequential damage as a result. In the instant case, the sessions' judge had meticulously dealt with each and every element of negligence. *MA Clyde v. Wong Ah Mei & Anor* (FC) (folld); *Takong Tabari v. Government of Sarawak & Ors* (para 7)

(3) The appellants' contention that there was no evidence to support the respondent's claim for loss of earnings was misconceived. Proof of earnings in accident claims does not necessarily require formal documents. If the appellants wanted a lesser sum to be awarded, they had to adduce the relevant evidence for the court to assess a reasonable amount. Mere challenge or putting the respondent to strict proof was of no value. (paras 8, 9 & 10)

(4) The appellants' complaint against the sessions' judge's award for nursing care and cost of transportation was frivolous and vexatious as the trial judge had adequately dealt with the issue. Cost of nursing care is an allowable 'head' of claim even if the service is provided gratuitously by family members

and the plaintiff cannot provide documentary evidence to substantiate the claim *Marappan & Anor v. Siti Rahmah bte Ibrahim*. Similarly, reasonable transportation cost is a recognised 'head' of claim, though it may not be substantiated by documentary evidence. *Mat Jusoh bin Daud v. Syarikat Jaya Seberang Takir*. These 'heads' of claim, even if not substantiated by evidence, do not prohibit the trial judge from awarding a fair and reasonable sum taking into consideration the facts of the case and the genuineness of the claim inclusive of the quantum of the claim. In the instant case, the learned sessions judge had adequately dealt with the relevant issues and awarded a reasonable sum which was not excessive on the facts of the case, more so when there was no credible evidence and argument that a lesser amount should be awarded. (para 11)

(5) There were no valid reasons for appellate interference in the instant case. Generally, in accident matters both the plaintiff and the defendant must assist the court in assessing a reasonable sum as quantum. Merely putting to strict proof and denying liability on quantum, as was done in the instant case will not assist the appellate court in interfering with the award of quantum. The defendant cannot evade liability by simply 'putting to strict proof'. (para 14)

(6) The appellate court will not interfere with an award of damages merely on the complaint that it is excessive, unless the amount arrived at was erroneous in that there was an omission on the part of the trial judge to consider some relevant materials, or had admitted for purposes of assessment some irrelevant considerations. *Tan Kuan Yau v. Suhindrimani.* Such complaints and the facts leading to the grounds must be adequately reflected in the Memorandum of Appeal. In the instant case the sessions' judge had meticulously dealt with all the issues raised by the appellants in the said judgment. (para 14)

Case(s) referred to:

Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor [1995] 4 CLJ 317 HC ***(refd)***

Fadzly Nor Rahim v. Chang Foh Chin [2007] 10 CLJ 233 HC ***(refd)***

Lai Hie Hua v. Lim Teong Yu & Anor [2009] 1 CLJ 98 HC ***(refd)***

Lau Kung Kai v. Abu Serah Bol [2008] 10 CLJ 245 HC ***(refd)***

Law King Po & Ors v. Sacofa Sdn Bhd & Ors [2008] 10 CLJ 258 HC ***(refd)***

A *MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC* ***(foll)***
Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 SC ***(refd)***
Mat Jusoh Daud v. Sykt Jaya Seberang Takir Sdn Bhd [1982] CLJ 366; [1982] CLJ (Rep) 562 HC ***(refd)***
B *Mohamad Khalid Yusuf v. Datuk Bandar Kuching Utara & Anor [2007] 9 CLJ 314 HC* ***(refd)***
Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor [2008] 1 LNS 88 HC ***(refd)***
Sam Wun Hoong v. Kader Ibramshah [1981] 1 LNS 103 FC ***(refd)***
Takong Tabari v. Government of Sarawak & Ors [1996] 5 MLJ 435 ***(refd)***
C *Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC* ***(refd)***
Voon Jan Choo v. Lee Chie Siang & Anor [2007] 9 CLJ 242 HC ***(refd)***

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For the respondents/defendants - Ani Solep M/s Ani Solep & Co Advocates
D

Reported by Andrew Christopher Simon

JUDGMENT

E

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant/defendants' appeal against the decision of the learned session's judge in
F respect of liability and quantum arising from an accident inside a brick factory wherein a brick packer, the respondent/plaintiff was injured by a forklift driver in consequence of negligence.

Brief Facts

G **[2]** In this case the respondent's husband was a contractor to pack the bricks in the appellant factory. The respondent was working with the husband to pack the bricks when the accident took place. The respondent says: (i) she was working as a brick packer and was at her usual place of work in the factory and she
H was hit from behind by a forklift which was being driven by the 2nd appellant who was an employee/agent of the 1st appellant; (ii) the accident was caused by the negligence of the 2nd appellant who was driving the forklift laden with pallets of bricks which blocked his view; (iii) the accident caused the respondent to suffer
I injuries as contained in the medical report; (iv) the accident also caused the respondent to suffer special and general damages; (v) the 1st appellant is vicariously liable for the negligence of the 2nd appellant being his employer/master.

[3] The appellants say: (i) The respondent was not working as a brick packer at the 1st appellant's factory and the respondent was put to strict proof thereof. (ii) The appellants denied that the accident was caused solely by the 2nd appellant and each and every allegation of the negligence and put the respondent to strict proof thereof. (iii) Further and/or in the alternative, the appellants contended that the said accident was caused wholly or in part by the negligence of the respondent. (iv) The appellants did not admit that the respondent sustained the injuries and other adverse effects thereto.

[4] Judgment was entered for the sum of RM40,500 for general damages and RM110,566.20 for special damages with interest. The learned session judge has summarised the award as follows:

(a) General damages	RM40,500
(ii) for bilateral superior and inferior pubic rami fracture and	RM25,000
(ii) closed fracture of the sacrum is	RM20,000

(RM25,000 + RM20,000 = RM45,00000 less 10% overlapping RM40.500)

(b) Special Damages	RM466.20
(i) Fees for Police Reports, sketch plan, Photographs etc	RM16.20
(ii) Fee for medical reports	RM40.00
(iii) Search fee paid to Companies Commission of Malaysia	RM10.00
(iv) Transportation to and from SGH Kuching for treatment and follow-ups	RM400
(c) Loss of earnings	RM108,000
(d) Nursing care (RM350 x 6 months)	RM2,100
Grand Total	RM151,066.20

[5] The appellant is not satisfied in any part of the judgment of the learned sessions judge and has filed a lengthy memorandum of appeal disputing every item inclusive of liability and the said memorandum of appeal *inter alia* says that the learned sessions judge has erred in law and fact: (i) in holding that appellants are wholly liable to the respondent or at all when in fact and in truth there was no such evidence to support such findings. (ii) in awarding RM108,000 as respondent's loss of earning as there was no evidence to support the respondent earned at least RM1,000. (iii) in awarding RM2,100 and RM350 per month for six months when there was no evidence to support the award. (iv) a sum of RM400 awarded for transportation for treatment and follow up was wrong in law as there was no evidence to support such an award. (v) the award of RM40,500 for pain and suffering and loss of amenities is wrong in law and is highly excessive. (vi) giving weight to the evidence of two doctors in determining the award of injuries. (vii) failed to undertake judicial appreciation of fact and evidence in deciding liability and not finding the respondent liable for contributory negligence.

Preliminaries

[6] It is most unfortunate that the appellants in the memorandum of appeal has chosen to challenge liability and quantum, and that too in respect of each and every 'head' of the award without satisfying the criteria there was in fact errors of law as opposed to matters which are within the discretion of the trial judge. Such failure in my view will attempt to show that the appeal is frivolous, vexatious and abuse of process of court. More so when it is trite that the appellate court will not ordinarily interfere in the finding of facts of trial judge and/or in respect of quantum merely because it appears to be excessive, unless the following are shown: (i) that the award or findings were clearly wrong or erroneous, taking into account irrelevant matters and not considering relevant matters, (ii) that the findings were clearly wrong in law and principle. I have dealt with this area of law inclusive of vicarious liability in a number of cases; to name a few are as follows: (i) *Voon Jan Choo v. Lee Chie Siang & Anor* [2007] 9 CLJ 242 (ii) *Mohamad Khalid Yusuf v. Datuk Bandar Kuching Utara & Anor* [2007] 9 CLJ 314 (iii) *Fadzly Nor Rahim v. Chang Foh Chin* [2007] 10 CLJ 233 (iv) *Law King Po & Ors v. Sacofa Sdn Bhd & Ors* [2008] 10 CLJ 258 (v) *Lau Kung Kai v. Abu Serah Bol* [2008] 10 CLJ 245 (vi) *Lai Hie Hua v. Lim Teong Yu & Anor* [2009] 1 CLJ 98

Arguments

[7] I do not think there is any merit in the appellants' argument that the learned sessions judge wrongfully found the appellants 100% liable as this issue has been dealt in detail by the trial judge and had correctly evaluated the evidence and came to a finding that the respondent was hit by the forklift from behind when she was standing and working in her usual place of work. It is trite the issue of negligence is a question of fact and not of law. In *MA Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73, the Federal Court held that negligence is a question of fact and each case must depend on its own facts. To determine the issue of negligence, the court must evaluate the following evidence, namely (i) who caused the accident? (ii) was there a duty of care? (iii) was there any breach of that duty to take care? (iv) were there any consequential damage as a result? (See *Takong Tabari v. Government of Sarawak & Ors* [1996] 5 MLJ 435). In the instant case, the learned sessions judge has meticulously dealt with each and every element of negligence.

[8] The appellants' contention that there was no evidence to support that the respondent earned at least RM1,000 and to award a sum of RM108,000 as respondent's loss of earnings is misconceived. The learned sessions judge has meticulously dealt with this issue, and came to the conclusion as follows:

> On the facts, the Plaintiff was about 37 years old and was gainfully working as a brick packer at the 1st Defendant's factory at the time of the accident. She was earning by her own labour or gainful activity at least RM1,000 per month. Note that 'earnings' include overtime, part time earnings, tips and allowances, even though incidental to earnings and the expression 'earnings' in s. 28A(2)(c)(i) Civil Law Act 1956 must be read together with the words 'or other gainful activity' (*Marappan & Anor v. Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99).

[9] It is trite that proof of earnings in accident claims does not necessarily require formal documents such as Income Tax, EPF or SOCSO contributions. Support for the proposition is found in number of cases, namely (i) *Abdul Ghani Hamid v. Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 CLJ 317; (ii) *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103. I have dealt with this area of law relating to loss of support (not loss of earnings) in the case of *Lai Hie Hua v. Lim Teong Yu & Anor* [2009] 1 CLJ 98 and that part of the judgment reads as follows:

A In respect of loss of support, I take the view it was a finding of fact. The learned sessions judge has wide discretion to deal with the issue taking into consideration the local circumstance and the wages of the particular locality. In this case there was no evidence proved according to law as to the actual earnings of the deceased. Just because the plaintiff's evidence is not challenged it does not give a substantive right for the plaintiff to assert that their evidence for loss of support must be accepted. From various cases in this area of law the jurisprudence is that the court must exercise its judicial mind before assessing the quantum to be awarded for loss of support. (See *Lau Kung Kai v. Abu Serah Bin Bol* [2008] 1 LNS 303; *Mahmod Bin Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68)

[10] In such case, if the defendants want to say a lesser sum must be awarded for earnings then the defendants must adduce some evidence to assist the court to assess the reasonable amount. Mere challenge and/or putting the plaintiff to strict proof will be of no value.

[11] The appellants' contention that the learned sessions judge ought not to have awarded a sum of RM2,100 at the rate of RM350 per month for six months and a sum of RM400 for transportation for treatment and follow up was wrong in law, in actual fact is a frivolous and vexatious submission taking into consideration that the learned sessions judge had adequately dealt on this issue. Evidence in this case showed that the respondent was initially bedridden, then confined to the wheel chair, later she used a walking stick or anything she could hold on to for support to move about. It is trite that the costs of nursing care is an allowable 'head' of claim even if the service is provided gratuitously by family members and the plaintiff cannot provide documentary evidence to substantiate the claim (see *Marappan Nallan Koundar & Anor v. Siti Rahmah Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174). Similarly reasonable transportation cost is a recognised 'head' of claim, though it may not be substantiated by documentary evidence. (see *Mat Jusoh Daud v. Sykt Jaya Seberang Takir Sdn Bhd* [1982] CLJ 366; [1982] CLJ (Rep) 562). In essence all these 'heads' of claim if not substantiated by evidence, do not prohibit the trial judge from awarding a fair and reasonable sum taking into consideration the facts of the case and the genuineness of the claim inclusive of the quantum of the claim. In the instant case, the learned sessions judge had adequately dealt

with the relevant issues and awarded a reasonable sum which is not excessive on the facts of the case, more so when there was no credible evidence and argument that a lesser amount should be awarded.

[12] The appellants' contention that the learned sessions judge ought not to have given weight to the two doctors who gave evidence in determining the award of injuries has no legal basis. In this case the nature of injury was not in issue and the appellants' have not adduced any evidence to the contrary. The learned sessions judge had dealt with this issue in detail and the finding reads as follows:

> The evidence on the present conditions/state of health of the plaintiff are as confirmed by PW4 and PW5 who have confirmed that the current complaints/complications/symptoms are consistent with the injuries sustained. Their evidence has not been rebutted and hence the Plaintiff is not lying about the disabilities arising out of the injuries sustained from the accident.

[13] Further the learned sessions judge had correctly evaluated the evidence and authorities and that part of the judgment reads as follows:

> In my judgment, having considered the authorities quoted on the trend of award in cases involving similar types of injuries and in view of the present injuries and disabilities as well as the present value of money, an assessment of RM25,000.00 would be just and fair compensation for bilateral superior and inferior pubic rami fracture and the sum of RM20,000.00 for closed fracture of the sacrum making the total sum of RM45,5000.00. Taking into account overlapping of 10%, the plaintiff should be awarded a sum of RM 40,500.00 (RM45,000.00 - RM4,500.00) for pain and suffering and loss of amenities.

[14] I have read the Memorandum of Appeal, Appeal Record and the submission of the parties in detail. I take the view that the appeal must be dismissed. My reasons are as follows:

(a) The learned sessions judge had considered the issue of liability and quantum in detail in her 31 pages judgment. For reasons stated earlier, I do not see any valid reasons to interfere in the judgment. Further, as a general rule in accident matters, the issue as to liability may be contested but when it comes to quantum both the plaintiff and defendant must assist the

court to arrive at a reasonable sum. Merely putting to strict proof and denying liability on quantum at trial stage, as was done in the instant case will not assist the appellate court to interfere in the award of quantum. In addition, pleadings are the essential foundation to analyse disputes. The defendants will not be allowed to evade liability by simply saying put to 'strict proof'. See *Recaliva Design Steel (M) Sdn Bhd v. Vista Access Sdn Bhd & Anor* [2008] 1 LNS 88.

(b) It is trite that the appellate court will not interfere with award of damages merely on the complaint that it is excessive, unless the amount arrived at was erroneous in that there was an omission on the part of the trial judge to consider some relevant materials, or had admitted for purposes of assessment some irrelevant considerations. (See *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323). Such complaints and the facts leading to the grounds must be adequately reflected in the Memorandum of Appeal. In the instant case the learned sessions judge has meticulously dealt with all the issues raised by the appellants in the said judgment. I do not see any valid reasons for appellate interference.

[15] For reasons stated above, I dismiss the appeal with costs to the respondent. The getting up fees shall not exceed RM10,000. If costs cannot be agreed, the respondent is a liberty to tax the costs.

[16] I hereby order so.